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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SHONA MARIE BLAS, Defendant and Appellant.	F077225 (Super. Ct. No. CRF53276) **OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Andrea Keith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chapman and Eric L. Christoffersen, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted defendant Shona Marie Blas of criminal threat (Pen. Code, § 422, subd. (a)) and interference with a wireless communication device (*id.*, § 591.5) after she

threatened to kill her 84-year-old grandmother and threw her grandmother's phone when her grandmother tried to call the police. (Further undesignated statutory references are to the Penal Code.) On appeal, defendant challenges her convictions, arguing the court prejudicially erred by concluding she voluntarily absented herself from a portion of the second day of trial, failing to hold a competency hearing, and not instructing the jury on the crime of attempted criminal threat. She further argues she is entitled to a remand to permit the court to exercise its discretion regarding whether to permit her to seek mental health diversion under newly enacted section 1001.36.

We conditionally reverse defendant's convictions and remand for the trial court to conduct an eligibility hearing pursuant to section 1001.36.

FACTUAL BACKGROUND

Defendant was charged with making a criminal threat in violation of section 422 (count I), false imprisonment of an elder adult by violence or menace in violation of section 368 (count II), and interference with a wireless communication device in violation of section 591.5 (count III).

Defendant was out on bond during trial. She appeared at the preliminary hearing and the court subsequently ordered her to appear on January 24, 2018, at 8:00 a.m. for trial. That day, defendant was not present when the parties initially met in chambers. The court informed counsel it would issue a bench warrant and send the jury home if defendant was not present once all the jurors were accounted for and the jury was "logged in." Defense counsel notified the court defendant had contacted his office to tell them she was running late and she wanted to be present during jury selection. Defendant arrived late and was escorted to chambers. The court then proceeded with jury selection and the first day of trial with defendant present.

Defendant's grandmother, B.A., testified first. B.A. lived by herself on seven acres of property in Tuolumne County. In May 2017, defendant had been staying with B.A. for a few weeks. During her stay, defendant "would go off the deep end sometimes

and say things." But B.A. denied defendant said anything threatening to her in the weeks leading up to the incident underlying the charges; rather, she testified defendant "just talked … crazy about life in general." On the day of the incident, defendant and B.A. had an argument. During the argument, B.A. told defendant, "Why don't you just kill me? I'm 83—84 years old and I have had a full time," "I'm ready to go." Defendant took B.A.'s two cellular phones from the end table and threw them when B.A. told her she was going to call the police; B.A. thought the phones broke but they were not damaged. Defendant then asked B.A., "Why don't you hit your Life Alert button?" B.A. pressed her medical alert device button "thinking that somebody would come and talk to [them]"; B.A. "wanted to get help" for defendant. B.A. testified she "had no idea the police would be involved."

B.A. left the house after hitting the button to "meet whoever was coming out to talk to [them]" at the road to her house. She met a sheriff's deputy, Deputy Erik Hoffmann, and told him defendant was "angry" and had called B.A. a "whore" and a "bitch." B.A. was crying and upset at the time. She told Deputy Hoffmann defendant had been increasingly hostile in the days leading up to the incident. On one previous occasion, B.A. gave defendant her walking stick and defendant said, "You know better than giving me a stick. I might kill you with it." Another time, defendant slammed a cupboard causing a door to come off. At trial, however, B.A. denied telling Deputy Hoffmann that defendant threatened to kill B.A. and cut her head off on the day of the incident. B.A. also did not recall telling Deputy Hoffmann she left the house because she feared for her safety and believed defendant's threats. Rather, B.A. testified she was "never afraid" of defendant, and she left the house because she did not want to have a further confrontation with her.

Following B.A.'s testimony, the court released the jurors and ordered them to return the next day at 8:30 a.m. At 8:50 a.m. the following day, the court called an in-chambers conference with counsel, outside of the jury's presence, because defendant had

not appeared for "unknown reasons." The court noted defendant "was supposed to be here at 8:30," and it was the court's "intention to proceed with the trial in her absence" because "the law allows the Court to proceed in a felony case to try the defendant in her absence when there is an indication she has voluntarily absented herself from the trial." The court stated it would go over the "instructions and other issues …, and when that is concluded, … we'll go in and have the jury come in and begin taking further evidence in the People's case." In response, defense counsel noted, "It is almost 9:00 o'clock, but it is my understanding that it snowed up the hill last night, so I would ask to get started at, say, 10:00 o'clock and give her at least that hour to get here. I know she lives either in Santa Cruz at times or some other out-of-county place, and it seems like she has made most of her court appearances." The court explained it "would prefer to have her here," but "[i]f she went back to Santa Cruz last night, odds are we aren't going to see her this morning." Defense counsel clarified, "I didn't mean to imply she went to Santa Cruz last night. I just know she was staying in Santa Cruz and she came here, and—I think Sunday night she stayed at a local hotel." The court noted an additional "complication"; it had to cover a family law docket at 10:30 a.m. After confirming defendant was not in or outside of the courtroom, at 9:20 a.m. the court concluded defendant was "voluntarily absent[]" and it would proceed with trial in her absence. It noted, "We're just going to proceed. I assume she is going to show up because she is always late, and we'll just proceed as if she decided to sleep in." Before the jury, the court stated, "The record will reflect that [defendant] has not arrived yet. We don't know the reason why she is not here. I suspect that it might be a weather issue, but we're going to proceed in her absence, and I hope that she will arrive shortly."

The People then called Deputy Hoffmann as a witness. Deputy Hoffmann testified he was dispatched to B.A.'s house on May 5, 2017, to conduct a welfare check after the sheriff's department received notice of a medical alert from that residence. When Deputy Hoffmann turned down the unpaved road leading to the house, B.A.

flagged him down by waving her hand outside her car window. Deputy Hoffmann pulled over and spoke with B.A., who was very upset and told Hoffmann she needed his help. B.A. reported that her granddaughter was "out of control" and had threatened her. When B.A. calmed down, she explained to Hoffmann defendant had been staying with her recently and was becoming "increasingly hostile toward her, making threats." She mentioned the incident when she gave defendant her walking stick to use while checking the property for snakes and defendant had said, "You know better than giving me a stick. I might kill you with it." B.A. reported to Deputy Hoffmann that defendant began arguing with B.A. that morning, at around 10:30 a.m., and B.A. "became very uncomfortable." Defendant told B.A., "'I am going to kill you and cut off your head.'" "[A]s the argument escalated, [B.A.] wanted to call the sheriff's office," but defendant took B.A.'s cellular phones out of her hand and threw them on the ground and then hid them so B.A. could not use them. Defendant asked B.A. why she did not use her medical alert device to call for help. B.A. then pressed the button of her medical alert device while defendant called her a "bitch," a "whore," and other profanities. B.A. "became pretty scared," "she didn't feel safe staying in the house so she ran out of the house, got into her Jeep Cherokee, and fled the area in order to drive to … get some help." According to Hoffmann, B.A. stated she believed defendant "would carry out the threats and kill her," which is why B.A. ran out of the house without any of her things. B.A. told Hoffmann "she was too scared to go back to her residence, and she was going to go stay with her daughter."

The court took a break in the middle of Deputy Hoffmann's testimony. During the break, at 10:10 a.m., defendant arrived and was present once the testimony resumed. After Deputy Hoffmann's testimony concluded, the prosecution rested and defendant testified on her own behalf.

Defendant testified she lived in another county but considered her grandmother's address her permanent residence. According to defendant, she went to her grandmother's

house in the days leading up to the incident to handle certain issues related to their car. Defendant testified, on the day of the events giving rise to the charges, she and B.A. were arguing; defendant could not recall her exact words but she did not remember telling B.A. she would cut her head off. She also did not remember telling B.A. she would kill her and, "[e]ven if [she] did, [s]he would never kill [her] grandmother," she loved her. Defendant told B.A. to hit her medical alert device button after B.A. repeatedly said, "kill me, kill me, kill me," and she often had been saying things of that nature such as "'I don't want to be here.'" Defendant denied forcing her grandmother to leave the house. She also did not think she threatened B.A. Defendant admitted, however, that she and B.A. were not speaking nicely to each other that day. She also admitted that she took B.A.'s phones, but she did not recall throwing them on the ground. Defendant testified B.A. was not cut off from communication because she still had her medical alert device. Defendant remembered the incident when B.A. handed defendant her walking stick and defendant said, "'Why did you give that to me? You know I could kill you with it?'" After defendant testified, the defense rested.

The next day, the jury returned a verdict at 3:25 p.m. and convicted defendant of making criminal threats (count 1) and interference with a wireless communication device (count 3) and not guilty of false imprisonment (count 2). Defendant was not present when the verdict was read.

After the court dismissed the jury it noted, "Let the record reflect that [defendant] has not arrived. It is now 3:35. I was not going to remand her into custody. I was going to order her to go to probation, but I'm going to issue a bench warrant, and I'll make it a no bail warrant. I will stay the warrant until 5:00 o'clock. If she shows up before 5:00 o'clock, I will re-call the warrant and order her to go to probation, and we'll notify your office, [Defense Counsel]. [¶] And I will also set a sentencing date if she shows up and tell you what that is as well." At 5:00 p.m., no parties were present and defendant had

not appeared. Accordingly, the bench warrant that had previously been stayed was issued and the posted bail was deemed forfeited.

Approximately two months later, the court held a sentencing hearing. Defendant was present during sentencing. The court sentenced defendant to four months' probation, two months less than the six months recommended by the probation department. The court explained it deviated from the recommendation because it suspected there was "an emotional or psychiatric issue here." It suspended imposition of judgment for five years and ordered defendant to follow a psychological/psychiatric treatment plan.

DISCUSSION

I. The Court Did Not Prejudicially Err by Proceeding With Trial in Defendant's Absence

Defendant first contends the court erred in proceeding with trial and the reading of the verdict in her absence in violation of her statutory and constitutional rights to be present and the error was not harmless.

A. Standard of Review and Applicable Law

"'[D]ue process guarantees [a criminal defendant] the right to be present at any "stage … that is critical to [the] outcome" and where the defendant's "presence would contribute to the fairness of the procedure."' [Citation.]" (*People v. Cunningham* (2015) 61 Cal.4th 609, 633.) "But the right [to be present] is not an absolute one…. It may be expressly or impliedly waived." (*People v. Espinoza* (2016) 1 Cal.5th 61, 72; see *People v. Cunningham*, *supra*, at p. 633 ["As a matter of both federal and state constitutional law, … a defendant may validly waive his or her right to be present during a critical stage of the trial, provided the waiver is knowing, intelligent, and voluntary"]; see also *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1206 [court need not obtain written or oral waiver of statutory right to presence if other evidence indicates defendant voluntarily chose to be absent].)

Section 1043 further provides in relevant part that the defendant in a felony case "shall be personally present at the trial." (*Id.*, subd. (a).) However, the defendant's absence "after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in … [¶] … [¶] [a]ny prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent." (§ 1043, subd. (b)(2).) "'"Unquestionably section 1043, subdivision (b)(2), was designed to prevent the defendant from intentionally frustrating the orderly processes of his trial by voluntarily absenting himself." [Citation.]' [Citation.] It provides the trial court with clear guidance and direct authority to ensure the orderly process of trial when a defendant is absent voluntarily." (*People v. Concepcion* (2008) 45 Cal.4th 77, 83.) A defendant can implicitly waive the right to be present where the record shows she is '"'aware of the processes taking place,"' she knows '"h[er] right and of h[er] obligation to be present,"' and she has '"no sound reason for remaining away."'" (*People v. Espinoza, supra*, 1 Cal.5th at p. 74.)

Section 1148 states, "If charged with a felony the defendant must, before the verdict is received, appear in person, unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that the verdict be received in his absence."

The California Supreme Court has held "[e]rroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice." (*People v. Perry* (2006) 38 Cal.4th 302, 312; see *People v. Perez* (2018) 4 Cal.5th 421, 438 ["Although the exclusion of the defendant from a critical proceeding constitutes error, it is not structural error"]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357 ["Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial"].) Under the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless beyond a reasonable

doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23. (*People v. Davis* (2005) 36 Cal.4th 510, 532.)

"The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence." (*People v. Espinoza, supra,* 1 Cal.5th at p. 74; accord, *People v. Concepcion, supra,* 45 Cal.4th at p. 84.) "'In determining whether a defendant is absent voluntarily, a court must look at the "totality of the facts."'" (*People v. Espinoza*, at p. 72; see *People v. Gutierrez, supra,* 29 Cal.4th at p. 1205.)

B. Analysis

Defendant argues the trial court violated her constitutional and statutory rights to be present by proceeding with the trial and permitting the verdict to be read in her absence. She contends "an affirmative act by the defendant is vital to prove voluntary absence" and she "did not affirmatively state her intentions on the record to abstain from the proceedings" or "ignore any request by the trial court." Instead, she "likely had a sound reason for missing the beginning of the trial as, according to her attorney, she was late due to weather conditions." She asserts the evidence is "contrary to a voluntary waiver" given the trial court's acknowledgment that she "is usually late and [it] knew she would show up for the trial." She further argues the error was prejudicial because the court "not only failed to instruct the jury regarding [her] absence but the court invited the jury to speculate" by stating it did not know why defendant had not arrived though it suspected it might be a weather issue. Additionally, she missed the testimony of "a key prosecution witness, the officer that took the statement from the complaining witness and provided the evidence that proved [defendant] guilty." She contends she "could have aided counsel in the cross examination by hearing the direct examination." Finally, she argues the reading of the verdict in her absence also amounted to prejudicial error. The People respond defendant "forfeited any claim of error by failing to adequately object

below and by failing to present any evidence contesting the court's finding of voluntary absence." They further contend substantial evidence supported the trial court's conclusion defendant voluntarily absented herself from trial, and her absence was harmless beyond a reasonable doubt. Assuming, arguendo, this issue was not waived, considering the totality of the facts, we conclude the court did not prejudicially err by finding defendant voluntarily absent and proceeding with the trial and permitting the verdict to be read in her absence.

Here, defendant was present when trial commenced. At the end of the first day of trial, the court announced the second day of trial was to start the next day at 8:30 a.m. The following day, after waiting for 25 minutes for defendant to arrive, the court called counsel into chambers to discuss defendant's absence. During the conference, defense counsel did not indicate, as he had the day before, that defendant had contacted him or his office regarding her whereabouts and her intention to attend. Rather, defense counsel speculated that defendant may have been late due to the weather. The court then stated its intention to proceed in defendant's absence after it had concluded certain administrative matters. It noted that it considered defendant to have "voluntarily absented" herself. The trial then proceeded at 9:20 a.m., approximately an hour after its scheduled start time. Defendant arrived at 10:10 a.m. and there is no evidence in the record she or her counsel explained her tardiness. She was present during the conclusion of Deputy Hoffmann's testimony and then proceeded to testify on her own behalf and to attend closing arguments. However, she did not reappear for the reading of the verdict or in response to the issuance of a bench warrant compelling her appearance.

"[T]he record, which we have described, supports the trial court's view that defendant was '"aware of the processes taking place,"' that [s]he knew '"h[er] right and of h[er] obligation to be present,"' and that [s]he had '"no sound reason for remaining away."'" (*People v. Espinoza*, *supra*, 1 Cal.5th at p. 74 [substantial evidence supported trial court's conclusion "defendant implicitly waived his right to be present" where record

reflected "defendant knew his trial had commenced, that it was scheduled to continue the next day, and that he had both a right and an obligation to be present in court in the morning for the trial to proceed" but did not appear. "No more was constitutionally required"]; see *People v. Connolly* (1973) 36 Cal.App.3d 379, 385–386 [decision to proceed in defendant's absence was supported in part because court ordered defendant to return to court at 9:00 a.m., defendant acknowledged order and stated he would return, defendant had not called his attorney, the court, or prosecutor regarding his absence, he was aware his trial was in progress, and he had appeared at prior court proceedings].) Thus, substantial evidence supports the trial court's conclusion defendant voluntarily absented herself from the beginning of the second day of trial.

In so holding, we note that at least one court has stated in dicta, "In the usual case a continuation of at least a few hours in order to locate defendant is appropriate." (*People v. Connolly*, *supra*, 36 Cal.App.3d at p. 385.) And here, the court proceeded with trial less than an hour after it was initially scheduled. However, we must look at the totality of the circumstances in reviewing the court's conclusion defendant's absence was voluntary. (*People v. Espinoza*, *supra*, 1 Cal.5th at p. 72; *People v. Gutierrez*, *supra*, 29 Cal.4th at p. 1205.)

Here, there is no evidence defendant tried to contact the court or her counsel regarding her absence. Thus, the court had no idea if and when defendant might appear as it had no information before it beyond defense counsel's unsupported suggestion that her absence could have been weather related. Defense counsel also did not formally seek a continuance or ask the court for time to locate defendant, though he did informally request an additional hour delay to permit defendant to show up. Defendant had previously been late. Once present, defendant did not seek reconsideration of the court's finding of voluntary absence, present the court with an explanation for her tardiness, or seek a new trial on that basis. Even on appeal she does not contest that her absence was voluntary but rather states her initial absence was *likely* due to weather conditions. She

also did not appear for the verdict reading or thereafter despite the issuance of a bench warrant. On this record, considering the totality of facts, we conclude substantial evidence supports the trial court's holding defendant was voluntarily absent for the beginning of the second day of trial. (See *People v. Concepcion*, *supra*, 45 Cal.4th at pp. 84–85 ["defendant did not move for reconsideration of the determination of voluntary absence, and he did not seek to bring to the trial court's attention any new evidence that purportedly undermined that determination. He does not even now contest that his absence was voluntary"]; *People v. Connolly*, *supra*, 36 Cal.App.3d at pp. 384–385 ["[I]n reviewing a challenge to the continuation of a trial pursuant to … section 1043, subdivision (b)(2), … the court's initial determination is not conclusive in that, upon the subsequent appearance of the defendant, additional information may be presented which either affirms the initial decision of the court or demands that defendant be given a new trial. It is the totality of the record that must be reviewed in determining whether the absence was voluntary"].)

Notably, our conclusion that defendant's voluntary absence operated to waive her constitutional and statutory right to be present at trial does not end our inquiry regarding the propriety of the trial court's decision to proceed with the trial in her absence. (*People v. Espinoza*, *supra*, 1 Cal.5th at p. 75.) Section 1043, subdivision (b)(2) states that a defendant's voluntary absence "shall not prevent" the trial from continuing, but it does not require it. Accordingly, the decision whether to continue with a trial in absentia under the statute or to declare a mistrial rests within the discretion of the trial court. (*Espinoza*, *supra*, at p. 75.)

We cannot conclude the court abused its discretion in proceeding with trial in defendant's absence. The California Supreme Court has acknowledged the significant time and resources dedicated to a criminal trial:

> "'By the time the oath is administered to the jurors selected in a criminal case, significant resources (both fiscal and human) have been tapped. A

> courtroom and its personnel have been set aside for the trial, precluding their use for the trial of any other case. Prospective jurors have been summoned, at great cost and inconvenience to many of them. The prosecutor and defense counsel have arranged their schedules accordingly and may have had to continue other cases they are handling. Subpoenaed witnesses have taken the steps necessary to ensure that they are available to testify. The court and counsel may have invested time, energy, and resources to prepare for and address motions *in limine*. During voir dire, prospective jurors have been subjected to personal, probing questions. And if another matter had to be reset because the criminal trial has made the courtroom and its personnel unavailable to try the other case, the administration of justice has been affected, and other parties have been inconvenienced, often at great personal expense.'" (*People v. Concepcion*, *supra*, 45 Cal.4th at pp. 83–84.)

And here, trial had begun, the jurors had been sworn and were present, the prosecution had already presented one witness and another witness was present and ready to testify, and the trial was set to conclude that day. The court had no information before it regarding if and when defendant would appear and her counsel did not formally request a continuance. On this record, we cannot conclude the court abused its discretion in proceeding with the trial in defendant's absence.

Additionally, section 1043, subdivision (b) expressly provides that a defendant can voluntarily absent herself from the proceedings once trial has commenced "including, the return of the verdict." Again, the record before us establishes defendant was present for portions of the trial, including when the jurors began deliberating. Thus, she was aware of the processes taking place and knew of her right and obligation to be present but still did not appear before the reading of the verdict. Indeed, she did not even appear after the verdict reading despite a bench warrant compelling her appearance.

However, even if we were to conclude this record is insufficient to establish reasonable diligence to procure defendant's presence during the verdict reading, we conclude any alleged error in proceeding with the trial and verdict reading in defendant's absence was harmless beyond a reasonable doubt. Contrary to defendant's assertion, in *People v. Young* (2005) 34 Cal.4th 1149, the California Supreme Court did not announce

a bright-line rule that a defendant's absence is harmless only if it is "during the presentation of a defense witness rather than a prosecution witness." Rather, the *Young* court simply considered the fact that the defendant missed one of his own witness's testimony as a factor in analyzing whether the error resulted in prejudice. (*People v. Young*, *supra*, at p. 1214.)

Here, Deputy Hoffmann's testimony centered on B.A.'s report to him of the incident giving rise to the charges. As the People note, defendant "was not a percipient witness to the conversation between Deputy Hoffmann and [B.A.], so she was not in a position to provide any factual assistance to her counsel to aid in cross-examination." And defendant does not explain how her presence during Deputy Hoffmann's testimony or the reading of the verdict could have possibly altered her convictions. Additionally, defense counsel cross-examined Hoffmann and defendant was present for a portion of Hoffmann's testimony. Furthermore, we note, the jury's acquittal of defendant on count II for false imprisonment belies her argument that the jury held her absence during Hoffmann's testimony and the verdict reading against her and convicted her on that basis. On this record, we conclude defendant's absence was harmless beyond a reasonable doubt. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1358 ["defendant has failed to explain how his attendance during the testimony of these witnesses would have altered the outcome of his trial and, accordingly, has not demonstrated any prejudice"].)

We reject defendant's first contention.

II. The Court Did Not Err in Failing to Hold a Competency Hearing

Defendant next contends the court erred in failing to hold a competency hearing.

A. Procedural History

On the first day of trial, defense counsel notified the court defendant had called his office to alert them she was on her way but running late, and if she could not pick the jury, she wanted a new lawyer. When defendant arrived, the court asked defense counsel

to discern if defendant was making a motion to discharge her counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

"THE COURT: She's here?

"[DEFENSE COUNSEL]: Yeah, she is here. [¶] All right. And I don't know if she wants a Marsden motion or not. And, you know, it is the last minute, and I don't know if it is best for the Court to speak to her for a few minutes and inquire about another lawyer and see how she behaves and make a decision from there, but …

"THE COURT: You had a talk with her, right?

"[DEFENSE COUNSEL]: Yeah.

"THE COURT: Were you able to discern any intelligent request from that conversation?

"[DEFENSE COUNSEL]: She started going off on the FBI and this FBI civil harassment problem, and each time I asked her to stop talking so I could ask her another question, she would pause for a couple of seconds, nod her head, and then start talking again about something unrelated.

"THE COURT: Did the suggestion that she wanted another lawyer come up at any point in this conversation you had with her this morning?

"[DEFENSE COUNSEL]: I can't tell.

"[PROSECUTOR]: That is encouraging.

"[DEFENSE COUNSEL]: Because I tried to ask. And I know what she said to my legal clerk and I know what my legal clerk texted me, and I clarified it when I got back to my office, so I would say maybe. So—we're here, so—

"THE COURT: Well, I certainly don't want to suggest to [defendant] that she get another lawyer by inquiring as to what she wants. I mean, if she has made a statement to you that is sufficiently clear that she wants to make this Marsden motion, I will do it. But she hasn't done that, has she?

"[DEFENSE COUNSEL]: Well, not sufficiently clear, but unfortunately, there is [*sic*] a lot of things she hasn't made sufficiently clear except to say her grandmother wants to drop the charges, and she repeats that a lot. [¶] So, you asked whether or not I can control her testifying and

all that. The only way—and at one point, you know, at the prelim, I thought I could. Today, I can't really make that guarantee, so you may just have to interrupt her. If we go, you may just have to interrupt her a lot with the not rattling on.

"[PROSECUTOR]: Like, from sitting next to you she might just burst out talking?

"[DEFENSE COUNSEL]: That has never happened, so I can't say. I'm talking about on the witness stand where I say 'Hey, where do you live?' and she just starts going off talking, talking, talking.

"THE COURT: I will do what I can to control that. [¶] Well, let's bring her in with everybody here.

"[PROSECUTOR]: I can sit over there, and then she can sit here (indicating).

"THE COURT: And I will tell her we're going to go to trial today, and we'll see what—and I'm going to tell her about talking over people and that sort of thing, and we'll see what she says.

"[DEFENSE COUNSEL]: Okay.

"THE COURT: If she raises an issue about a Marsden, then we'll deal with that, okay?"

The court then discussed the jury trial process with defendant, which defendant stated she understood. Defendant asked if the jury would be advised of the punishment for each charge and if there was an option for "mediat[ing]" "outside the court." The court explained punishment would not be discussed with the jury and "[w]hatever negotiations might have happened up to now are over, and we're here to go to trial." The court then proceeded with jury selection and trial.

B. Standard of Review and Applicable Law

"A criminal trial of an incompetent person violates his or her federal due process rights. [Citation.] The state Constitution and section 1367 similarly preclude a mentally incompetent defendant's criminal trial or sentencing. [Citations.] A defendant is incompetent to stand trial if the defendant lacks '"sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding … [or] a rational as well as

factual understanding of the proceedings against him.'" [Citations.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 194–195.)

Section 1368 provides in pertinent part:

> "(a) If, during the pendency of an action and prior to judgment, … a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court."

"[A] trial court is obligated to conduct a full competency hearing if substantial evidence raises a reasonable doubt that a criminal defendant may be incompetent. This is true even if the evidence creating that doubt is presented by the defense or if the sum of the evidence is in conflict. The failure to conduct a hearing despite the presence of such substantial evidence is reversible error." (*People v. Lightsey* (2012) 54 Cal.4th 668, 691.)

"The decision whether to order a competency hearing rests within the trial court's discretion, and may be disturbed upon appeal 'only where a doubt as to [mental competence] may be said to appear as a matter of law or where there is an abuse of discretion.'" (*People v. Mickel*, *supra*, 2 Cal.5th at p. 195; accord, *People v. Pennington* (1967) 66 Cal.2d 508, 518.) "[A]bsent a showing of 'incompetence' that is 'substantial' as a matter of law, the trial judge's decision not to order a competency hearing is entitled to great deference, because the trial court is in the best position to observe the defendant during trial." (*People v. Mai* (2013) 57 Cal.4th 986, 1033.) "On review, our inquiry is

focused not on the subjective opinion of the trial judge, but rather on whether there was substantial evidence raising a reasonable doubt concerning the defendant's competence to stand trial." (*People v. Mickel*, *supra*, at p. 195.)

C. Analysis

Defendant argues there was substantial evidence of incompetence arguing she "spoke in random tangents and outbursts and did not understand the judicial process nor could she aid her attorney in her defense." In support, defendant cites her attorney's representation that "he could not follow [defendant]," "she was incoherent" when he tried to ascertain if she sought to discharge him as counsel, and "'[s]he started going off on the FBI and this FBI civil harassment problem … each time [defense counsel] asked her to stop talking so [he] could ask her another question.'" Defendant further contends her inquiry into whether mediation was an option showed she "did not understand the proceedings against her." She relies on *People v. Murdoch* (2011) 194 Cal.App.4th 230 (*Murdoch*), *People v. Jackson* (2018) 22 Cal.App.5th 374 (*Jackson*), *People v. Johnson* (2018) 21 Cal.App.5th 267 (*Johnson*), and *People v. Rodas* (2018) 6 Cal.5th 219, in support of her argument. The People respond the evidence cited at most suggests "that on the morning of trial, defense counsel was having some difficulty getting information from [defendant] regarding her desire for a new attorney," but it did not constitute substantial evidence of incompetence. We agree with the People; the trial court did not abuse its discretion by not holding a competency hearing.

The California Supreme Court has recognized "more is required to raise a doubt [about a defendant's competency] than mere bizarre actions [citation] or bizarre statements [citation]." (*People v. Laudermilk* (1967) 67 Cal.2d 272, 285.) And here, "[e]ven supposing defendant is correct that the various examples of [her] rambling, marginally relevant speeches cited in [her] briefing may constitute evidence of some form of mental illness, the record simply does not show that [s]he lacked an understanding of

the nature of the proceedings or the ability to assist in h[er] defense." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1064.) Rather, the record reflects defendant was responsive to the trial court when discussing the nature of the proceedings, expressed an interest in participating in jury selection, and testified coherently on her own behalf. We do not agree with defendant's assessment that her question about whether "mediation" was an option constituted evidence that she did not understand the proceedings against her. Rather, defendant's inquiry regarding mediation in context appeared to be her way of asking whether there was a way of resolving the matter without trial, e.g., a plea bargain, albeit using incorrect terminology. On this record, we cannot conclude the court abused its discretion by not holding a competency hearing.

The authorities defendant relies upon are inapposite. In *Murdoch*, the court had before it testimony from mental health experts that the defendant had a "major" or "severe" mental illness but was competent to stand trial because of the medication he was taking. (*Murdoch*, *supra*, 194 Cal.App.4th at p. 233.) However, the experts opined the defendant's mental state could deteriorate again if he stopped taking his medication, and one report indicated the defendant had stopped taking his prescribed medication. (*Ibid*.) The defendant moved to represent himself and, at trial, his defense to battery and assault charges was that the victim was not human. (*Id*. at pp. 234–235.) On appeal, the *Murdoch* court concluded the defendant's statements before the court coupled with the experts' warning he needed to be medicated and the report that the defendant had stopped taking his medications provided the substantial evidence necessary to demonstrate a reasonable doubt as to whether he had become incompetent again as the experts had warned. (*Id*. at pp. 237–238.) The *Murdoch* court noted the record established more than simply bizarre statements or actions by the defendant, and the trial court erred in failing to hold a competency hearing. (*Ibid*.)

In *Jackson*, medical professionals unanimously agreed the defendant had a chronic developmental disability limiting his ability to grasp and retain information. (*Jackson*,

supra, 22 Cal.App.5th at p. 393.) The defendant was found incompetent before and after a finding by the court that he had regained competency. (*Id.* at pp. 376.) The *Jackson* court reversed the trial court's competency finding, concluding outdated reports and evaluations that did not address issues initially raised regarding the defendant's competency were not substantial evidence defendant was competent and that he understood his legal situation well enough to stand trial months later. (*Id*. at pp. 392–394.) Additionally, evidence that the defendant learned how to parrot expected responses to the most basic questions about the judicial process after numerous repetitive drills by hospital staff also did not provide substantial evidence he was competent to stand trial. (*Id*. at pp. 394–395.)

In *Rodas*, the California Supreme Court evaluated whether substantial evidence supported the trial court's conclusion the defendant regained competency after he was initially found to be incompetent to stand trial. (*Rodas*, *supra*, 6 Cal.5th at p. 223.) The *Rodas* court held the trial court erred in failing to suspend the criminal trial and initiate competency proceedings when defense counsel declared a doubt as to her client's competence. (*Ibid*.) In so holding, the *Rodas* court noted "when a formerly incompetent defendant has been restored to competence solely or primarily through administration of medication, evidence that the defendant is no longer taking his medication and is again exhibiting signs of incompetence will generally establish … a change in circumstances and will call for additional, formal investigation before trial may proceed. In the face of such evidence, a trial court's failure to suspend proceedings violates the constitutional guarantee of due process in criminal trials." (*Ibid*.)

In *Johnson*, the defendant engaged in multiple acts of self-mutilation, shouted to voices in his head, could not be quieted during court proceedings, defecated in his pants, and was placed in a medical unit at the prison where he was given medication and was put on suicide watch; his lawyer expressed doubt throughout the trial about the defendant's mental competence and ability to understand the proceedings and assist in his

defense. (*Johnson*, *supra*, 21 Cal.App.5th at p. 271.) The *Johnson* court concluded the defendant's behavior constituted substantial evidence he was not mentally competent to stand trial, and the trial court's failure to hold a competency hearing violated his federal and state right to due process and necessitated reversal of the judgment. (*Id*. at p. 280.)

Here, the trial court was not presented with a situation as in *Murdoch*, *Jackson*, and *Rodas* where defendant had previously been found to be incompetent and the trial court had before it the defendant's history of mental illness and evidence suggesting decompensation after competence had been restored. And, unlike in *Johnson*, at most, the record here reflects defendant made some rambling, confusing, and perhaps bizarre statements to her lawyer and in court that, without more, are insufficient to establish that a competency hearing should have been held. On this record, we cannot conclude the trial court abused its discretion in failing to hold a competency hearing. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 403 [evidence of defendant's tangential ramblings, that his mood and behavior had changed leading up to the crime, and doctor's testimony that defendant suffered from a psychotic mental illness was not substantial evidence that required court to hold competency hearing].)

We reject defendant's second contention.

III. Mental Health Diversion

Defendant seeks a conditional remand for the court to consider her eligibility for a mental health diversion plan pursuant to section 1001.36.

A. Section 1001.36

Effective June 27, 2018, the Legislature created a diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. (§ 1001.36, subd. (a).) One of the stated purposes of the legislation was to promote "[i]ncreased diversion of individuals with mental disorders … while protecting public safety." (§ 1001.35, subd. (a).)

"'[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment." (§ 1001.36, subd. (c).) "If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

"On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion … if the defendant meets all of the requirements …." (§ 1001.36, subd. (a).) There are six requirements. (§ 1001.36, subd. (b).) First, the court must be "satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders." (§ 1001.36, subd. (b)(1)(A).) "Evidence of the defendant's mental disorder shall be provided by the defense and shall include a recent diagnosis by a qualified mental health expert." (*Ibid*.) Second, the court must also be "satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense." (*Id.*, subd. (b)(1)(B).) "A court may conclude that the defendant's mental disorder was a significant factor in the commission of the charged offense if, after reviewing any relevant and credible evidence, … the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense." (*Ibid*.) Third, "a qualified mental health expert" must opine that "the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment." (*Id.*, subd. (b)(1)(C).) Fourth, subject to certain exceptions, the defendant must consent to diversion and waive his or her right to a speedy trial. (*Id.*, subd. (b)(1)(D).) Fifth, the defendant must agree "to comply with treatment as a condition of diversion." (*Id.*, subd. (b)(1)(E).) And finally, the court must be "satisfied that the defendant will not pose an

unreasonable risk of danger to public safety … if treated in the community." (*Id.*, subd. (b)(1)(F).)

If a trial court determines that a defendant meets the six requirements, then the court must also determine whether "the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant." (§ 1001.36, subd. (c)(1)(A).) The court may then grant diversion and refer the defendant to an approved treatment program. (*Id.*, subd. (c)(1)(B).) "The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years." (*Id.*, subd. (c)(3).) If the defendant commits additional crimes, or otherwise performs unsatisfactorily in diversion, then the court may reinstate criminal proceedings. (*Id.*, subd. (d).) However, if the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings …." (*Id.*, subd. (e).)

B. Section 1001.36 Applies Retroactively to Defendant

Defendant contends her case should be remanded for the trial court to consider her eligibility for pretrial diversion pursuant to newly enacted section 1001.36, which she claims applies to her retroactively. The People maintain section 1001.36 does not apply retroactively to cases, such as this, that are already adjudicated.

The California Supreme Court recently resolved a split amongst the Courts of Appeal regarding the retroactivity of section 1001.36 and concluded section 1001.36 applies retroactively to judgments not yet final on appeal. (*People v. Frahs* (2020) 9 Cal.5th 618, 624 (*Frahs*).) It held nothing in "the text nor the history of section 1001.36 clearly indicates that the Legislature intended that the [*In re Estrada* (1965) 63 Cal.2d 740] rule[, which stated that an amendatory statute lessening punishment for a crime was presumptively retroactive and applied to all persons whose judgments were not yet final at the time the statute took effect,] would not apply to this diversion program." (*Ibid.*)

Here, defendant was convicted and sentenced before section 1001.36 went into effect and her appeal was pending when this provision became effective. Thus, pursuant to the Supreme Court's holding in *Frahs*, section 1001.36 applies retroactively to this case.

C. Defendant Is Entitled to Conditional Reversal of Her Convictions

We must next consider whether the record before us supports a limited remand and conditional reversal of defendant's convictions for the trial court to consider defendant's eligibility for mental health diversion. Defendant argues remand is warranted because "there was evidence of mental health issues" and "at the probation and sentencing hearing, the court routinely referred to psychiatric counseling for [defendant]." The People do not address whether defendant is eligible for relief if the statute is found to be retroactive. We conclude remand is warranted.

In *Frahs*, the California Supreme Court held "a conditional limited remand for the trial court to conduct a mental health diversion eligibility hearing is warranted when … the record affirmatively discloses that the defendant appears to meet at least the first threshold eligibility requirement for mental health diversion—the defendant suffers from a qualifying mental disorder (§ 1001.36, subd. (b)(1)(A))." (*Frahs, supra*, 9 Cal.5th at p. 640.) In so holding, the *Frahs* court acknowledged that "[w]hen, as here, a defendant was tried and convicted before section 1001.36 became effective, the record on appeal is unlikely to include information pertaining to several eligibility factors, such as whether the defendant consents to diversion (§ 1001.36, subd. (b)(1)(D)), agrees to comply with treatment as a condition of diversion (*id.*, subd. (b)(1)(E)), or has provided the opinion of a qualified mental health expert that the defendant's symptoms would respond to mental health treatment (*id.*, subd. (b)(1)(C))." (*Id.* at p. 638.)

Here, we conclude "the record affirmatively discloses" defendant "appears to meet at least the first threshold eligibility requirement for mental health diversion." (*Frahs*,

supra, 9 Cal.5th at p. 640.) The probation report states as a circumstance in mitigation that "defendant was likely suffering from a mental condition that significantly reduces her culpability for the crime." The probation officer recommended defendant be placed on probation with the condition "she seek treatment for mental health if deemed necessary." The report further notes defendant previously "participated in counseling for depression." And, when the court sentenced defendant, it explained it deviated from the probation report's recommendation because it suspected there was "an emotional or psychiatric issue here." It suspended imposition of judgment for five years and ordered defendant to follow a psychological/psychiatric treatment plan.

In light of the California Supreme Court's guidance that we infer "the Legislature intends ameliorative statutes like this one to apply as broadly as possible within the constraints of finality," we conclude this record sufficiently reflects defendant "appears to meet at least the first threshold eligibility requirement." (*Frahs*, *supra*, 9 Cal.5th at pp. 638, 640.) We express no view concerning whether defendant will be able to show eligibility on remand or whether the trial court should exercise its discretion to grant diversion if it finds her eligible. "'If the trial court finds that [defendant] suffers from a mental disorder, does not pose an unreasonable risk of danger to public safety, and otherwise meets the six statutory criteria (as nearly as possible given the postconviction procedural posture of this case), then the court may grant diversion. If [defendant] successfully completes diversion, then the court shall dismiss the charges. However, if the court determines that [defendant] does not meet the criteria under section 1001.36, or if [defendant] does not successfully complete diversion, then h[er] convictions and sentence shall be reinstated.'" (*Id.* at p. 641.)

IV. Failure to Instruct on Attempted Criminal Threat Was Prejudicial Error

Finally, defendant asserts the court reversibly erred in failing to instruct the jury on the lesser included offense of attempted criminal threat.

A. Standard of Review

"California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118; see *People v. Breverman* (1998) 19 Cal.4th 142, 162.) The duty extends to every lesser included offense supported by substantial evidence; it is not satisfied "when the court instructs [solely] on the theory of that offense most consistent with the evidence and the line of defense pursued at trial." (*Breverman, supra,* at p. 153.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Id.* at p. 162.) "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could … conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid.*) "We independently review a trial court's failure to instruct on a lesser included offense." (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

The "duty to instruct fully on all lesser included offenses suggested by the evidence arises from California law alone" (*People v. Breverman, supra,* 19 Cal.4th at p. 149), and thus a trial court's error in fulfilling this duty "must … be evaluated under the generally applicable California test for harmless error … set forth in [*People v. Watson* (1956) 46 Cal.2d 818]." (*Id.* at p. 176.) Under *Watson*, reversal is not warranted unless "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*Breverman, supra,* at p. 178; see *People v. Watson, supra,* at p. 836.)

B. Applicable Law

In order to prove a violation of section 422 for making a criminal threat, the prosecution must establish "(1) that the defendant 'willfully threaten[ed] to commit a

crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement … is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, … so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228 (*Toledo*); see § 422.)

In *Toledo*, the California Supreme Court considered whether attempted criminal threat is a crime in California. (*Toledo, supra*, 26 Cal.4th at p. 224.) In that case, during an argument with his wife, the defendant told her "'death [was] going to become [her] tonight,'" and he was going to kill her. (*Id.* at p. 225.) Later, the defendant approached his wife with a pair of scissors and plunged the scissors toward her neck, stopping inches from her skin. (*Ibid.*) The wife told police she was afraid the defendant was going to kill her; however, at trial, she denied being afraid. (*Ibid.*) The jury found the defendant not guilty of criminal threat but convicted him of attempted criminal threat. (*Id.* at p. 226.) He appealed, asserting there was no such crime as attempted criminal threat. (*Ibid.*)

The *Toledo* court affirmed the conviction. (*Toledo, supra*, 26 Cal.4th at p. 226.) It held a defendant may be found guilty of attempted criminal threat "whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action." (*Id.* at p. 230.) In so holding, the *Toledo* court explained in relevant part, "[I]f a defendant … acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat

does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Id.* at p. 231.)

C. Analysis

Defendant contends the facts of her case "are indistinguishable from the facts of *Toledo*." She argues "[B.A.] made it clear at the trial that she was not afraid of [defendant] the day the threat was made" providing "substantial evidence of an attempted criminal threat and the court erred by failing to instruct the jury accordingly." Defendant contends "there is a reasonable probability that [she] would have been convicted of an attempted criminal threat rather than a criminal threat," but the jury was only given the choice to convict her of making a criminal threat or finding her not guilty. Thus, she argues, the error in failing to instruct on attempted criminal threat was prejudicial. The People respond, "Given [B.A.]'s conflicting testimony, no reasonable juror could have concluded that [defendant] made the threat to cut off [B.A.]'s head but that [B.A.] was not afraid of that threat." Accordingly, they argue, B.A.'s testimony did not present substantial evidence to support an attempted criminal threat instruction. They further assert, if the court erred, the instructional error was harmless because B.A.'s statement to Deputy Hoffmann was clear and nearer in time to the incident, whereas her trial testimony was "inconsistent and ambiguous." We agree with defendant; the court prejudicially erred in failing to instruct the jury on attempted criminal threat.

The facts here are strikingly similar to those in *Toledo*. Here, as in *Toledo,* there was evidence defendant made a threat; the victim, B.A., reported being afraid at the time, but she denied she was in fear at trial. Thus, as in *Toledo,* there was substantial evidence—B.A.'s trial testimony—supporting a finding that B.A. was not afraid and that defendant was guilty of attempted criminal threat as opposed to criminal threat. While

this is not the only reasonable inference that can be drawn from the evidence, it is not an unreasonable inference. Accordingly, the trial court had a sua sponte obligation to instruct the jury on the lesser included offense of attempted criminal threat and erred in failing to do so.

We also agree with defendant that it is reasonably probable a properly instructed jury would have acquitted her of criminal threat because there was conflicting evidence on whether B.A. was in sustained fear. In the similar fact situation in *Toledo*, the jury acquitted the defendant of making criminal threats but found him guilty of the crime of attempted criminal threat. (*Toledo*, *supra*, 26 Cal.4th at p. 226.) The jury in this case should have been given the same opportunity, but the instructional error precluded it from acquitting defendant of making a criminal threat and finding her guilty of the attempt crime. A "'jury without an option to convict a defendant of a lesser included offense might be tempted to convict the defendant of an offense greater than that established by the evidence instead of rendering an acquittal.'" (*People v. Brown* (2016) 245 Cal.App.4th 140, 155.) Notably, the relevant inquiry is not whether defendant's conviction for criminal threat is supported by substantial evidence, but instead whether there is substantial evidence that would have supported a conviction for the lesser included offense. (See *id.* at p. 156 ["'it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence'"; to hold otherwise "would undermine the very purpose of the sua sponte rule"].) Because we conclude there is, we must reverse.

The parties agree that if we conclude the instructional error was prejudicial mandating reversal, the prosecution should be given the option to retry the greater offense or to accept a reduction to the lesser offense. Accordingly, on remand, if the court determines defendant does not meet the criteria under section 1001.36, or defendant does not successfully complete diversion and her convictions and sentence are to be reinstated, defendant's criminal threat conviction is reversed. The People may then elect to retry the

case against defendant for making a criminal threat, or instead elect to accept a reduction of the conviction to attempted criminal threat. (See *People v. Kelly* (1992) 1 Cal.4th 495, 528; *People v. Edwards* (1985) 39 Cal.3d 107, 118; *People v. Brown*, *supra*, 245 Cal.App.4th at p. 156.)

DISPOSITION

We conditionally reverse defendant's convictions and remand for the trial court to conduct an eligibility hearing pursuant to section 1001.36. On remand, if the court determines defendant does not meet the criteria under section 1001.36, or defendant does not successfully complete diversion and her convictions and sentence are to be reinstated, defendant's criminal threat conviction is reversed. The People may then elect to retry the case against defendant for making a criminal threat, or instead elect to accept a reduction of the conviction to attempted criminal threat. In all other respects, we affirm the judgment.

PEÑA, J.

WE CONCUR:

FRANSON, Acting P.J.

DESANTOS, J.